Supreme Court, U. S.
FILED
AUG 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1625

IMAGE CARRIER CORPORATION,
HOUSE OF LITHOGRAPHY, INC.,
ASSOCIATED LITHO AND LETTERING
SERVICE, INC.,

Petitioners,

v.

EDWARD I. KOCH,
MAYOR OF NEW YORK CITY, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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STATEMENT

The Respondents and Respondent-Intervenor raise numerous arguments in opposition to this Court's granting of certiorari. The majority of these arguments are without substance and adequately refuted in the Petition for a Writ of Certiorari. However, the Respondents and the Respondent-Intervenor raise certain arguments which only serve to obfuscate the real issues presented in the case. In order to clarify any misconception raised by these arguments, this Reply Brief is respectfully submitted.

I. Respondent-Intervenor's Argument Concerning The Exclusion Of Local Governmental Bodies From The Purview Of The National Labor Relations Act Is Irrelevant To This Case.

In its brief, Respondent-Intervenor attempts to side-step the substantial issue of federal pre-emption raised by Respondents' restrictive contracting practices by concluding that the National Labor Relations Act imposes no duties or restrictions upon the actions of governmental bodies (RI-4, 5).[1] Such a conclusion is a non-sequitor and wholly irrelevant to the issue of federal pre-emption before this Court.

The issue of federal pre-emption raised in this case is simply whether Respondents' restrictive contracting practices infringe upon the right of private sector employers and employees to establish and maintain a non-union employment relationship, a right guaranteed by the National Labor Relations Act. Obviously, the action of governmental bodies vis-a-vis their own employees fall outside the purview of the National Labor Relations Act. However, the restrictive governmental action involved herein is directed against the private employment relationship between printers and their employees, specifically inhibiting these private sector employees from exercising their federally protected right to refrain from union representation.

A more classic case of a state's intrusion upon a federally protected right is difficult to imagine. It is conceded by the Respondents that the award of most city printing contracts is restricted to only those companies who are authorized to affix the union label. The actual effect of these arbitrary restrictive practices is clear. Petitioners and their employees are forced to unionize to the deprivation of their employees'

[1]Numbers in parentheses prefaced by "RI" refer to pages of Respondent-Intervenor's Memorandum In Opposition To Petition For Certiorari.

federally protected rights if they desire to obtain the economic benefit of being able to perform city printing contracts. In essence, the City is penalizing the employees of non-union employers for exercising the rights conferred on them by federal law.

The Respondents' union label policy clearly conflicts with federal labor law. As this Court has previously stated:

> When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by §7 of the National Labor Relations Act . . . , due regard for the federal enactment requires that state jurisdiction must yield. *To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requiremetns imposed by state law. Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 139 (1976) (emphasis added) (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)).

Unquestionably, the Respondents' restrictive contracting practices substantially impair the exercise of the right to establish a non-union working relationship — a right "plainly within the central aim" of the National Labor Relations Act.

II. Respondent-Intervenor's Argument Relating To A State's Ability To Insure The Payment Of Prevailing Wages Is Irrelevant To The Issues Presented To The Court In This Case.

In its brief, Respondent-Intervenor relies upon *National League of Cities v. Usery*, 426 U.S. 833 (1976), for the proposition that:

> "Since the state has the power to act so as to depress the minimum wage paid for performance of state work, then surely another state has the power to act so as to seek to uphold the prevailing union scales, the wages and the terms and conditions of employment of persons who perform state work." (RI-2)

Such reliance is wholly misplaced since it attempts to transform a decision of this Court concerning the right of sovereign states to set wage policies for governmental employees into a decision granting the right to infringe on private employment relationships in derogation of established federal labor policy.

By attempting to characterize this case as one concerning a state's right to promulgate and enforce prevailing wage rates, the Respondent-Intervenor completely distorts the real issue before this Court; that is, whether the Respondents can arbitrarily preclude open-shop printing companies in the City of New York from bidding on and being awarded City printing projects financed with New York taxpayer monies solely because of their status as open-shop printers. Contrary to Respondent-Intervenor's assertion, this is simply not a prevailing rate case, but a case dealing with total exclusion of open-shop printers and their non-union employees from performing City work. Petitioners' Complaint attacked the City's union label policy as implemented and enforced through Respondents' bid solicitation restrictions. Nowhere in these bid solicitations is prevailing wage mentioned.

Union status is not the litmus test of whether an individual printer is paying his employees the "prevailing rate". As the record below indicates, open-shop printing companies in New York often pay rates comparable with those of union shops. Moreover, as the record further reflects, New York State has a prevailing rate law, legislation separate and distinct from the union label policy which the City is here attempting to defend.

The record below evidences no attempt by Respondents to preclude Petitioners from bidding on City contracts because of their failure to meet any prevailing wage criteria. Petitioners were prohibited from bidding on state work solely due to their status as open-shop printers, regardless of their wage and benefit schedules.

III. Governmental Action Fostering Collective Bargaining Must Be Declared Invalid Where Such Action Infringes Upon The Federally Protected Right To Establish A Non-union Working Relationship.

Both Respondents and Respondent-Intervenor strenuously argue that state action which has the effect of fostering collective bargaining is a legitimate governmental purpose where such action assures industrial harmony in what *was* a traditionally "strike prone" industry (R-2, 3, 8, 15; RI-3).[2] Even assuming arguendo that Respondents have a legitimate concern in fostering and promoting collective bargaining, such concern must, in compliance with federal labor policy, preserve for employees and employers alike, the option to maintain their open-shop relationship. In the absence of such recognition, a policy of "fostering" and "promoting" collective bargaining is metamorphosized into a policy "foisting" and "promulgating" collective bargaining.

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[2]Numbers in parentheses prefaced by "R" refer to pages of Respondents' Brief in Opposition To Petition For Certiorari.

It is also fallacious to assume that the economic conditions of 1934 giving rise to the promulgation of the Mayoral Order are consistent with those which exist today. Quite simply, the pre-1934 conditions do not exist, and the possibility that the "industrial strife" endemic to printing industry labor relations prior to the Mayoral Order will return to the industry should Respondents' restrictive practices be barred is, at best, highly speculative.[3]

A police power measure, although constitutionally valid when enacted, may become arbitrary and, therefore, unconstitutional by the operation of later events. *Abie State Bank v. Bryan*, 282 U.S. 765, 772 (1931). Even if it is conceded that the union label policy accomplished a rational purpose and was therefore constitutionally valid at the time of its adoption, it is clear that today, the dichotomy between union and non-union status with respect to the award of public contracts is ill-suited to any conceivable governmental purpose. Whether its purpose is perceived to be the upgrading of economic conditions in the City's printing industry or the promotion of "industrial peace", it is clear that Mayor LaGuardia's Order has outlived its usefulness and today serves only to create an unwarranted monopoly among a minority of City printing establishments. Depression economic conditions no longer exist and the Congress, with the passage of the Wagner Act in 1935, established that private sector labor management relations in this country are to be governed by a comprehensive scheme of federal regulation.

[3]It should be pointed out that there is no evidence in the Record that the printing industry in New York City was a particularly strike-prone industry, or that the open-shop segment of the industry was more strike-prone than the union sector. Indeed, it is common knowledge that the converse has historically been the case. Certainly, the strike activity plaguing the New York City printing industry today is due almost totally to the breakdown of collective bargaining where union relationships have already been established and not due to organizational strikes as Respondent-Intervenor implies.

The failure of this Court to declare invalid Respondents' restrictive contracting practices will result in a serious breach of the federal labor relations regulatory scheme; a scheme this Court has scrupulously protected from the disruptive effects of State intrusions. Such a breach, if countenanced, will be a clear signal to labor organizations in all industries, that what might be unobtainable through the collective bargaining process can be garnered by Executive Fiat. If this is to be the case, the basic guarantees of the National Labor Relations Act may well be rendered meaningless.

CONCLUSION

This Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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DATED August 25, 1978
Washington, D.C.